

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4274**

Heard in Montreal, January 14, 2014

Concerning

**VIA RAIL CANADA INC.**

And

**UNIFOR**

**DISPUTE:**

The Discharge of Service Manager Mr. Robert Pouget on May 6, 2013 for sexual misconduct involving a minor on the train.

The Company contends, as a preliminary matter, that the grievance is untimely and improper, having exceeded the time limits during the grievance procedure.

**COMPANY'S ExPARTE STATEMENT OF ISSUE:**

Mr. Robert Pouget was discharged for his sexual misconduct while travelling onboard Train #1 on April 8<sup>th</sup>, 2013. The Corporation submits that Mr. Pouget's actions were prejudicial and damaging to the Corporation's reputation and legitimate business interests.

The Union contends that discharge was not the appropriate response to the matter. The Union requests the immediate reinstatement of Mr. Pouget with full seniority making him whole.

The Corporation maintains that termination of the employment relationship was the appropriate discipline.

**FOR THE UNION:  
(SGD.)**

**FOR THE COMPANY:  
(SGD.) B. Blair  
Senior Advisor, Employee Relations**

There appeared on behalf of the Company:

B. Blair	– Senior Advisor, Employee Relations, Montreal
C. Lariviere	– Manager, Customer Experience, Winnipeg
A. Court	– Manager, Customer Experience, Toronto
M. Boyer	– Senior Advisor, Labour Relations, Montreal

There appeared on behalf of the Union:

R. Fitzgerald	– National Staff Representative, Toronto
D. Andru	– Regional Representative, Toronto
R. Pouget	– Grievor

## **AWARD OF THE ARBITRATOR**

This arbitration concerns the discharge of Robert Pouget (“the grievor”) for two alleged incidents of sexual misconduct. At the time of his discharge, the Grievor had 13 years service with VIA Rail (“the Company”) and held the position of Service Manager (“SM”). An SM is responsible for the safety and well being of passengers. The grievor’s disciplinary record, though less than commendable, reveals no issues of a similar nature to the allegations made by the Company in this case.

The alleged incidents of sexual misconduct at issue are alleged to have taken place at approximately 1:00 am on Monday April 8, 2013, while the grievor was on vacation travelling in sleeper class on board a train heading west prior to its arrival in Winnipeg. At the time of the alleged incidents the alleged victim (TL), a 15-year old male, and his brother, were sitting in coach car 8125 (102). TL’s brother was sleeping at the time. TL and his brother’s parents were in a sleeper car.

The Grievor vehemently denies the allegations made against him.

### **Preliminary Objection**

There is no dispute that the grievor was dismissed on May 6, 2013, following an investigation held on April 26, 2013. The collective agreement provides that a disciplinary case may be processed at Step 2 of the grievance procedure within 21 days of the employee being notified of the discipline. On May 9, 2013, the local chairperson

wrote the grievance and says he delivered it to the manager's secretary on May 10, 2013 by leaving it on the desk after hours. The Company had asked that grievances be hand delivered to a representative of management. In the course of the transfer of authority from the former local chairperson to the new local chairperson, the latter discovered on July 3, 2013, that the Company had not received the grievance. It was re-submitted on July 4, 2013. At that time the Company informed the Union that it would be taking the position that the grievance was untimely.

The chairperson's statement and the details provided surrounding its delivery suggest strongly that the grievance was submitted on May 10, 2013. The correspondence between the previous chairperson and the new one as well as correspondence with the Company demonstrates that as soon as the Union became aware that the Company had not received the grievance, the Union resubmitted it. For whatever reason, it went missing. The Company contends that since the grievance was not processed within the prescribed time limits, it is therefore to be considered dropped. The Union submits that the grievance was submitted in a proper and timely manner. In the alternative the Union requests that I exercise my discretion pursuant to section 60 the *Canada Labour Code* to relieve against any failure to adhere to the strict time limits set out in the collective agreement.

I have no difficulty finding that the reason for the delay, its length and the nature of the grievance weigh heavily in favour in my exercising my discretion to relieve against time limits in this case. The reason for the delay appears to be an innocent error. The

grievance pertains to a termination, a very serious matter. The Company submitted that the prejudice it would suffer in this case was that the grievance process would not be respected. That is not the sort of prejudice contemplated by the jurisprudence. The Company has to show that it is disadvantaged in the defense of the grievance as a result of the delay. It does not claim any disadvantage. The Company's preliminary motion cannot succeed.

### **Incidents of Sexual Misconduct**

In assessing the merits of the grievance based on the incidents of alleged sexual misconduct set out below, I have reviewed the following statements: the grievor's investigation statement of April 26, 2013, the written statements of TL and his father of April 8, 2013, SM Hardie's Incident Report of April 8, 2013, SM Bellemare's written statement of October 10, 2013, SM Barbosa's written statement of October 16, 2013 and SM Hardie's investigation statement of April 18, 2013. This latter statement was given in the context of an investigation into an allegation that he had been derelict in his duties pertaining to his handling of this matter.

The two alleged incidents came to the Company's attention because TL approached the SM on board at the time, SM Hardie, at approximately 1:45 am on April 8, 2013. Beyond completing a vague incident report at the end of his shift on April 8, 2013, SM Hardie did not give a detailed account of his information surrounding the events of April 8, 2013, until 10 days after the incidents allegedly occurred. And even

then, SM Hardie made no mention of the most serious aspect of this case, namely TL's allegation that the grievor tried to reach for his groin area. The allegations of improper conduct in SM Hardie's investigative statement are that TL's claimed that the grievor had approached him inappropriately (but did not touch him) and that the grievor appeared to have been engaging in sexual relations with another man, one of whom in TL's words "could have" been giving the other a "blow job."

After the alleged incidents took place, TL found SM Hardie in the skyline car and for the next two hours TL remained there with SM Hardie. After TL complained to SM Hardie, he advised the grievor there had been a complaint made against him and that he was to go back to his sleeper car. When TL's brother woke up, he joined TL in the skyline and the brothers then returned to their seats in the coach car. Their parents, who were in a sleeper car on the other side of the skyline car, were unaware of any alleged incident during the night.

At the end of SM Hardie's shift, when Customer Experience Manager Chantal Lariviere ("Manager Lariviere") reviewed SM Hardie's incident report, she spoke to him. SM Hardie told Manager Lariviere that the incident was one of "sexual advancement" but that TL clarified several times that no one had actually touched him. SM Hardie also conveyed to Manager Lariviere that the passenger (who later came to be identified by SM Bellemare as the grievor) had left when TL had told him to "get lost." Finally, SM Hardie conveyed to Manager Lariviere that according to TL, the same passenger was "with" another male coach passenger (who the Company was later able to identify)

before he approached TL. Manager Lariviere made clear to SM Hardie that the grievor was to stay away from the L family.

The oncoming SM, SM Bellemare received a debriefing from SM Hardie concerning the incident reported by TL, and went to see the family to obtain TL's version of what had happened the night prior. Before that happened, the grievor approached the L family in the Winnipeg train station and offered an apology for a misunderstanding. When SM Bellemare approached TL's parents to obtain TL's version, his father was angry and relayed to SM Bellemare that the grievor had approached them. SM Bellemare reported back to Manager Lariviere who then instructed SM Bellemare to obtain TL and his father's written statements.

After lunch in the dining car, SM Bellemare obtained the following statements from TL and his father. TL's statement is as follows:

I, TL, on April 8, 2013 at approximately 1:00 am in car 8125 sitting in seat 15 B, witnessed two men sitting three seats ahead. I looked as if the one man was giving the other man a blow job. They saw me looking at them so I pretended to go to sleep but kept my eye slightly open. The one man went to the bathroom then returned to his seat. Then the other man walked slowly past me and went to the bathroom. Less than 5 (five) minutes later he returned and walked two seats in front of me. He stopped and turned around and walked towards me. He stopped and tried to reach for my groin area. I opened my eyes fully and sat up. I looked him straight in the eyes and said "Get the fuck away from me." He left the car and I followed to find an attendant. I found Chris Hardie, the Service Manager, and told him what had happened. I was able to identify the man to Mr. Hardie and he went and spoke to him. I did not see the man again until the Winnipeg station later that morning.

The father's statement reads:

I, BL, father of TL was approached at the Winnipeg Train station just before noon on April 8, 2013 by the man that my son identified as the person that had approached him early in the morning of April 8 and wanted to apologize to my son for what happened the night before and said that it was a misunderstanding. I told him to "get the fuck away from us" and then he said he thought my son had sent a signal to him and I told him again "to get the fuck away from us" at that point he left and reboarded the train.

Shortly after the alleged incident occurred, on April 10, 2013, Manager Lariviere advised TL's father that the family could press criminal charges for the sexual assault of a minor. The family pursued no contact with the police, nor did the Company. As such the only direct information pertaining to the two allegations of sexual misconduct is the statement of TL and the grievor's statement taken during the subsequent investigation. At no time did the Company seek to obtain any additional information surrounding the statement TL had provided after leaving Winnipeg. Neither TL nor his father was in attendance at the hearing.

After leaving the Winnipeg station the grievor spoke to another company employee, Ms. Barbosa, who also happened to be on vacation at the time. On April 16, 2013, she prepared a written statement of their conversation. As Ms. Barbosa recounts it, the grievor explained that he had approached her because he wanted to know if the crew had spoken to her about the complaint, and if so the nature of the complaint. He

thought that because the crew knew she was a manager that the SM would have spoken to her. That had not been the case. According to Ms. Barbosa the grievor went on to relay the following:

Robert then told me that he had gone to the coach the evening before and had been chatting with another male passenger. He told me that throughout their time together another passenger kept glancing behind at them. He stated when he got up to leave he wondered if the passenger was either just curious or perhaps interested – However, when he approached the passenger he said to Robert: “don’t even Fucking go there” so Robert left. (I believe that he said he then went to the skyline car but am not sure.)

A short while later Robert told me that the SM approached him, told him that there had been a complaint about him and asked what his name was. The SM told him to go to his cabin. Robert told me that the next morning just prior to boarding in Winnipeg (we had detrained and taken the city tour) he saw the passenger with his family also waiting to board. He approached them to say he was sorry that there had been a misunderstanding. Robert told me that the father told him to “Get the fuck away.”

In the Grievor’s investigative statement given to the Company on April 26, 2013, when asked about the commentary relayed concerning whether TL was just curious or just interested, the grievor explained that Ms. Barbosa’s statement was misleading because she wrote only certain things but that the conversation had been about 20 minutes long. That conversation is described by the grievor as follows:

At this point, not knowing what the complaint was we talked about what may have prompted TL to make a complaint. Again, he may have been uncomfortable seeing two men sitting together talking, being friendly. We talked about maybe he was curious or interested in what was going on because he might be in the closet. Talked where they might be from because not all regions in the country might be accepting of these types of circumstances for instances in big cities like Toronto, Vancouver, Montreal. We talked about the way the father told me to “fuck off”, that you know he may be homophobic, judging by his aggressive reaction or response to my apology. She said from what you told me I can’t see you did anything wrong. She said like I’ve been working at the counter for many years and I am pretty good at reading people and the type of behaviour, things of that nature.



As stated above, the grievor vehemently denies the alleged incidents. He does not dispute that he returned to his cabin at the request of SM Hardie. The grievor admits that he approached TL's family the following day at the train station and apologized for a misunderstanding in the circumstances. He recounts that he did so after he noticed TL's father looking at him with a "disgusted" look on his face.

With respect to the first allegation – that he had been involved in sexual relations with another passenger 4 seats ahead of TL and his brother, the grievor's statement reveals a few things. He denied any sexual activity with the other man. According to the grievor, he had been sitting across the aisle from the other male passenger and that they had been engaged in a friendly conversation for approximately 30 minutes. The grievor then moved across the aisle and sat very closely – shoulder to shoulder beside the other man. The grievor said that he had touched the other passenger's knee and that the other passenger had touched his. According to the grievor, he was aware that TL had noticed the two men being friendly. TL and his brother had been looking above the seat, down the aisle and in between the seats.

The grievor vehemently denied that he tried to grab TL's groin. Contrary to TL's statement, the grievor said he walked by TL only once, when he returned to the sleeper section of the train. One must pass through the skyline to get to the sleeper section. The grievor's version was that when he went past TL he did not stop. Nor did he speak. While the grievor said that they did not make eye contact, he clarified that he did see

him in the seat as he was walking by. It was at that point that, according to the grievor, TL said “don’t even try it” as opposed to “get the fuck away from me” as alleged by TL.

### **Decision**

The allegations made in TL’s statement are very serious. If it is true that the Grievor tried to touch a minor sexually, the conduct would be worthy of the grievor’s discharge. Were it proven that the grievor was involved in sexual activity in the presence of other passengers on the employer’s train, that too would be worthy of some discipline.

The allegations against the grievor - that he publicly engaged in sexual activity, and that he attempted to solicit a minor for a sexual purpose – verge on criminal conduct. The Company is not subject to any greater burden of proof in this case. It need only prove that the alleged misconduct occurred on a balance of probabilities. But given the very serious nature of the allegations, the evidence must be clear and cogent.

### **Alleged sexual misconduct with the passenger**

The Company requests that I find that the grievor was one of two men engaged in a sexual act in the view of other passengers. In the face of the grievor’s denial, the only evidence before me is the brief statement in which TL claimed that it looked as if one man was giving the other man (one of whom was the grievor) oral sex. SM Hardie’s

recollection, 10 days after the fact was that TL's had told him "it could have been" a "blow job." That statement is not clear evidence that the grievor and the other passenger were in fact engaged in oral sex. Perhaps the reason for the tentative nature of TL's observation of the two men was that his view was obstructed or the lighting in the coach was dim. Or perhaps he was too far away to be sure. In any event, there is an element of speculation in TL's statement. Moreover, SM Hardie's recollection ten days after the incident is that TK told him "it could have been" that the grievor and the passenger were having oral sex. That is a less than definitive observation. The Company's allegation in respect of this allegation must fail.

### **Sexual Misconduct - The grievor's attempt to touch TL**

TL's allegation is that after returning from the bathroom, the grievor walked past him by two seats, then stopped, turned around and walked towards him, stopped and tried to reach for his groin. The Company relies entirely on these few details and does not attempt to amplify TL's statement with further evidence. The grievor's version simply cannot be reconciled with TL's. Moreover, it is difficult to reconcile some of the details provided by the grievor with those of SM Hardie.

What the Company's investigation does reveal is that the grievor knew nothing of the specifics of the allegation against him when he was simply told by SM Hardie to go back to his room. However, the grievor must have ascertained by TL's reaction that TL had thought the grievor was acting inappropriately towards him. I have reviewed the

material before me thoroughly, and I am persuaded that the grievor's statement was accurate to the extent that at no time was he told to stay away from the L family, contrary to what Manager Lariviere had directed SM Hardie to tell the grievor and contrary to what SM Hardie recollected telling him. In such circumstances, and given the manner in which TL's father would have likely been looking at the grievor the morning prior to re-boarding the train in Winnipeg, I can appreciate that the grievor may have felt compelled to "apologize" for a misunderstanding, if indeed that is what it was.

The father's statement that the grievor had said to him in the context of that apology that he thought TL had sent a signal to him is consistent with the grievor being interested in pursuing something of a sexual nature with TL. However, in the face of the grievor's denial, the evidence before me falls well short of proving on clear and cogent evidence that the grievor tried to touch the grievor sexually, or even that the grievor had made a sexual advance towards TL. I suspect something happened that led TL to react in the manner he did towards the grievor. However, I am unable to ascertain with any degree of confidence what that might have been on the evidence before me.

In this case the grievor was in attendance at the hearing. He voiced his concerns with the investigation and highlighted questions that stood out in his mind about the factual circumstances surrounding the allegations made. I must agree that the statement made by TL and the factual circumstances surrounding these serious allegations raise more questions than they provide answers.

In this case, virtually all of the evidence advanced by the Company is hearsay. TL did not even report the most serious of the allegations to SM Hardie when he spent 2 hours with him during the early hours of April 8, 2013. As for the brief written statements of SM Bellemare and Ms. Barbosa, they are generally consistent with the grievor's account of events. There are discrepancies with the grievor's account of what happened, but they are not sufficient turn the tide in favour of the Company's position.

The grievance must be allowed. The Company has failed to establish, on a balance of probabilities that the grievor committed the two incidents of sexual misconduct alleged against him. As such no assessment of discipline is justified against the grievor. He is to be reinstated into his employment without loss of seniority and with compensation for all wages and benefits.

January 27, 2014



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CHRISTINE SCHMIDT  
ARBITRATOR

